UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-879-CR-ROETTGER (S)

UNITED STATES OF AMERICA,

vs.

BENJAMIN BARRY KRAMER, et al.

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REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the defendant Benjamin Barry Kramer's Motion to Dismiss Counts 1, 2, 3, 26, 27, 28, 29, 31 and 45 of the Superseding Indictment on double jeopardy grounds, which was referred to United States Magistrate Lurana S. Snow, for report and recommendation. Based upon a careful review of the record in this cause, the arguments of counsel and the applicable caselaw, the undersigned concludes that this motion is frivolous and should be denied.

STATEMENT OF FACTS

The defendant Benjamin Barry Kramer (hereafter "Kramer") initially was charged in the Southern District of Illinois with conducting a continuing criminal enterprise, in violation of 21 U.S.C. §848 and conspiracy to distribute more than 1,000 pounds of marijuana, in violation of 21 U.S.C. §846. The time period alleged in each count was from in or about March, 1980 through February, 1987. The Illinois indictment charged as co-conspirators Randy Thomas Lanier, George Paul Brock, Eugene Albert Fischer, William R. Palumbo and Kay

Dee Bell. The indictment alleged that the defendants' activities occurred in the Southern District of Illinois, Kentucky, Florida, California, West Virginia, Louisiana, New York, Pennsylvania, Michigan, Indiana and elsewhere.

In 1988, Kramer was tried and convicted in the Southern District of Illinois. Pursuant to the penalty provisions of 21 U.S.C. §848(b), he was sentenced to life imprisonment without possibility of parole.

The instant indictment charges Kramer with RICO conspiracy, in violation of 18 U.S.C. §§1962(d) and 1963 (Count 1); substantive RICO, in violation of 18 U.S.C. §§1962(d) and 1963 (Count 1); substantive RICO, in violation of 18 U.S.C. §1962(c) and 1963 (Count 2); violations of the Travel Act, 18 U.S.C. §1952(a) (Counts 3-22, 24 and 26-31); making false statements on his federal income tax returns, in violation of 26 U.S.C. §7206(1) (Counts 42-44), and conspiracy to impede the Internal Revenue Service in the performance of its lawful functions, also known as a "Klein conspiracy," in violation of 18U.S.C. §371 (Count 45). The RICO conspiracy is alleged to have occurred during the period of January, 1975 through December, 1988 (when the indictment was returned), and the Klein conspiracy was alleged to have occurred from June, 1982 through December, 1988. According to the indictment, both conspiracies occurred in the southern District of Florida and elsewhere. The indictment names as co-defendants Melvyn Kessler, Jack Jerome Kramer and Michael Gilbert. The indictment does not allege any activity occurring in the Southern District of Illinois.

Kramer contends that prosecution of him on Counts 1, 2, 3, 26, 27, 28, 29, 31 and 45 will place him twice in jeopardy for the same offenses, in contravention of the Fifth Amendment to the United States Constitution. He argues that substantive RICO and RICO conspiracy are lesser included offenses of 21

U.S.C. §848(b); that RICO conspiracy is a lesser included offense of substantive RICO; and that prosecution of the offenses enumerated in the motion after conviction in Illinois is barred by the "same evidence test," the "totality of the circumstances test," and the "due diligence test." As discussed below, Kramer's memorandum of law in support of the motion is nicely written and superficially persuasive, but it simply ignores the clear holdings of the Eleventh Circuit in the area of double jeopardy.

RECOMMENDATION OF LAW

The courts uniformly have held that the double jeopardy clause protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple prosecutions for the same offense. *Albernaz v. United States,* 450 U.S. 333 (1981). The test for determining whether two offenses are the same for purposes of double jeopardy is "whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). This test applies to cases involving successive prosecutions as well s those involving simultaneous prosecutions. *Illinois v. Vitale,* 447 U.S. 410, 416 (1980).

As the court pointed out in *United States v. Phillips,* 664 F.2d 971, 1006 (5th Cir. Unit B. 1981):

> Although the *Blockburger* test has been referred to as the "same evidence" test, that standard focuses not on the evidence adduced at trial but rather on the elements of the offense charged. "If each [offense] requires proof of a fact that the other does not, the

> *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." (Citations omitted.)

The court also noted that under the *Blockburger* test, the same act or transaction may give rise to separate and distinct offenses under separate statutes. However, the *Blockburger* test sometimes is difficult to apply in complex conspiracy prosecutions. Thus,

> Although the government may not ordinarily separately prosecute a defendant for two conspiracies that are in reality the same conspiracy, or prosecute a defendant for a conspiracy or "transaction" that is part of a larger conspiracy, under the *Blockburger* test it is possible for single criminal agreement or conspiracy to give rise to distinct offenses under specific, separate conspiracy statutes.

Id., at 1007. Where the Government seeks to prosecute a defendant under two separate conspiracy statutes, the court must determine that each statutory provision requires proof of a fact that the other does not, *and* that each provision requires proof of a difference objective of the conspiratorial agreement. *Id.* citing *Albernaz, supra.*

Subsequent cases consistently have applied this test in determining whether prosecutions for separate conspiracies are permissible where the same evidence gives rise to different charges. *United States v. Watchmaker*, 716 F.2d 1459, 1467 (11th Cir. 1985); *United States v. Boldin*, 772 F.2d 719, 726-727 (11th Cir. 1985). And, under the explicit holdings of these cases, each of Kramer's double jeopardy claims must fail.

Kramer's first contention is that the RICO and RICO conspiracy charges are lesser included offenses of conducting a continuing criminal enterprise, of which Kramer was convicted in Illinois. Kramer concedes, as indeed he must, that *Phillips* specifically held that a defendant may be simultaneously prosecuted for RICO, RICO conspiracy and conducting a continuing criminal enterprise in violation of 21 U.S.C. §848. *Phillips, supra,* at 1013-1014. However, Kramer seeks to distinguish *Phillips* by arguing that the recently enacted penalty provision, 21 U.S.C. §848(b) requires proof of additional elements not addressed in *Phillips*. However, acceptance of this argument would require this Court to disregard the analysis applied by the *Phillips* court in reaching its conclusion.

The *Phillips* court reasoned as follows in determining that the RICO counts were not lesser included offenses of the §848 count:

Both the substantive RICO and RICO conspiracy counts require proof of facts and elements not required to be proved under §848, even though there is a substantial overlap in the proof offered to establish the crimes. In a substantive or conspiracy RICO prosecution, the Government must prove the existence of an enterprise that affects interstate commerce. The existence of an enterprise is an element that is separate from the element of the pattern of racketeering activity in which the enterprise engages; the enterprise is proved by evidence of a continuing organization and by evidence that the members function as a continuing unit. Mere proof of a pattern of racketeering activity, *i.e.*, commission of at least two acts of racketeering activity, is not sufficient to establish a RICO violation; there must also be proof of the existence of the enterprise itself. Section 848, by contrast, does not require proof of a RICO type enterprise. Rather §848 merely requires proof that the defendant undertook a continuing series of violations in concert or in conspiracy with five or more persons.

Proof of a §848 conspiracy does not establish proof of every fact and element necessary to show a RICO conspiracy violation. The object of a RICO conspiracy is to violate a substantive RICO provision, not merely to commit each of the predicate crimes constituting a pattern of racketeering activity. The gist of a RICO offense is that the defendant furthered a racketeering enterprise through a pattern of racketeering activity; a RICO count charges not the commission of the predicate crimes but rather the furthering of the enterprise. The object of a

> §848 conspiracy could be merely to commit the particular narcotics violations which taken cumulatively constitute a continuing series of violations.

Phillips, supra, at 1013-1014 (citations omitted). The enhanced penalty provision of §848(b) supplies no "missing element" which would affect this analysis. That section simply directs that a defendant who engages in a continuing criminal enterprise shall be sentenced to life imprisonment if:

> (1) such person is the principal administrator, organizer or leader of the enterprise or is one of several such principal administrators, organizers or leaders; and
>
> (2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or
>
> (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a

> substance described in section 841(b)(1)(B) of this title.

Clearly these additional requirements for imposition of the maximum penalty under §848 do not transform that statute into one which encompasses the elements of RICO and RICO conspiracy.

Kramer also asserts that RICO conspiracy is a lesser included offense of substantive RICO. Again, there is not way for Kramer to escape the explicit holding of *Phillips*, where the court states:

> A RICO *substantive* charge is not a conspiracy charge and it is axiomatic that a substantive offense is distinct from a conspiracy to commit that or another substantive offense. We hold that a RICO conspiracy count is not the same offense, for double jeopardy purposes, as a RICO substantive count.

Phillips, supra, at 1014. Clearly Kramer's argument on this issue is frivolous and merits no discussion.

Kramer also contends that the instant prosecution for substantive RICO, RICO conspiracy, violation of the Travel Act, and conspiracy to impede the Internal Revenue Service are precluded by the "same evidence test" and the "totality of the circumstances test." As discussed above, such tests simply do not exist in this Circuit (if anywhere). Moreover, the cases have specifically addressed the issue of whether the Double Jeopardy

Clause precludes prosecution for the offenses charged in the instant indictment where a defendant has been convicted of violations of 21 U.S.C. §848 or §846. *United States v. Phillips, supra* (defendant may be prosecuted for RICO conspiracy, substantive RICO and §848); *United States v. Boldin, supra* (prior conviction of conspiracy to import and to possess with intent to distribute a controlled substance does not preclude prosecution for violation of the Travel Act). See also, *United States v. Watchmaker, supra* (prior conviction for violation of the Travel Act does not preclude prosecution for RICO and RICO conspiracy).

The undersigned was not able to locate any case which holds that the Double Jeopardy Clause precludes a prosecution for conspiracy to impede the Internal Revenue Service in the performance of its lawful function where a defendant has been convicted of conducting a continuing criminal enterprise or conspiracy to distribute marijuana. This is not particularly surprising because the elements of these offenses are so different that no good faith argument can be made that the *Blockburger/Albernaz* test is satisfied. The objective of a Klein conspiracy is to defraud the United States, not to distribute illegal drugs. Clearly the Government is not barred from prosecuting Kramer on this charge.

Finally, Kramer contends that the Government cannot prosecute him in this District because it failed to exercise "due diligence." This argument is based on dicta in *Boldin, supra,*

where the court held that the defendant could be prosecuted for conducting a continuing criminal enterprise despite a prior conviction for conspiracy to possess illegal drugs with intent to distribute, in violation of 21 U.S.C. §846. [Ordinarily a prior conviction under §846 will bar a prosecution under §848 because conspiracy to possess drugs with intent to distribute is a lesser included offense of conducting a continuing criminal enterprise if the same criminal agreement is alleged. *United States v. Stricklin,* 591 E.2d 1112 (5th Cir.), *cert. denied.* 444 U.S. 963 (1979).] In affirming the appellants' convictions, the appellate court found that the "district court did not abuse its discretion in finding that the government did not in the exercise of due diligence have sufficient information to indict [the appellants] at the time of their prior prosecution for the current section 848 violations." *Boldin*, 772 F.2d at 732.

The Eleventh Circuit has not expressly determined whether a failure to exercise due diligence would ever constitute a ground for reversal, *United States v. Binker*, 799 F.2d 695, 696 (11th Cir. 1986), and it does not appear that the facts of the instant case warrant the creation of a new rule of law. The instant indictment was returned less that four months after the arrest of Kramer on the Illinois indictment; there are three defendants named in this case who were not charged in Illinois, and the activities alleged in this indictment all occurred outside the Southern District of Illinois. There simply is no precedent for dismissing the indictment on the ground that all

charges against Kramer should have been included in a single indictment in any one particular district.

The caselaw which binds this Court clearly indicates that there is no double jeopardy bar which precludes prosecution of Kramer on any count in the indictment. The gist of Kramer's motion is that prosecution in this district is "overkill" given the fact that the defendant has been sentenced to life imprisonment without parole. Although this reasoning has some appeal in light of the heavy caseload under which we all must labor, if carried to its logical conclusion a serial killer could be tried and convicted for only one murder. It is not the role of this Court to interfere with the prosecutorial discretion lawfully vested with the Attorney General in the absence of a constitutional mandate to do so.

CONCLUSION

This Court having considered carefully the pleadings, arguments of counsel, and the applicable case law, it is hereby

RECOMMENDED that the defendant Benjamin Barry Kramer's Motion to Dismiss Counts 1, 2, 3, 26, 27, 28, 19, 31 and 45 of the Superseding Indictment be denied as frivolous.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable

Norman C. Roettger, United States District Judge. Failure to file objections timely shall bar the parties from attaching on appeal factual findings contained herein. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 10th day of October, 1989.

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UNITED STATES MAGISTRATE
LURANA S. SNOW